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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MODINE MANUFACTURING CO.,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

Recently, this Court upheld EPA's authority to allow variances from its categorical pretreatment standards. *Chemical Manufacturers Assoc. v. Natural Resources Defense Council (1985)*. In the *CMA* case, EPA argued that the variance is essential to its pretreatment program. However, on February 10, 1984, EPA withdrew the variance provision for so-called "toxic" pollutants from its general pretreatment regulations and has not yet reinstated it. As a result, certain pretreatment standards, including those applicable to the metal finishing category, provide no mechanism for obtaining a variance and will require compliance before a variance can be sought. Even so, the court below upheld the metal finishing pretreatment standards and related compliance deadline. The questions presented are:

1) Whether the decision of the court of appeals is contrary to this Court's holding in *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 128 (1977) that effluent limitations may be set by regulation, "so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its [BPT] 1977 limitations."

2) Whether the court below was incorrect in upholding a deadline for compliance with certain pretreatment standards which prohibits atypical facilities from seeking a variance from the standards.

PARTIES

The parties to this action are as follows:

Modine Manufacturing Company* and U.S. Environmental Protection Agency.

Modine Manufacturing Co. ("Modine") was the petitioner below. The U.S. Environmental Protection Agency ("EPA") was the respondent.

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* Modine is not a subsidiary or affiliate of any publicly owned corporation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Modine Manufacturing Co. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The court of appeals did not issue an opinion in this case.

JURISDICTION

The order of the court of appeals was entered on May 17, 1985. It is set forth in the Appendix at A-1. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1) (1976).

STATUTES AND REGULATIONS INVOLVED

The Clean Water Act provisions involved in this case including Sections 301(b), 304(b) and 307(b) of the Act (33 U.S.C. § 1311(b), 1314(b), 1317(b) (1976 & Supp v 1981) are set forth in one Appendix at A-3-8.

EPA's regulation governing the establishment of "fundamentally different factors" ("FDF") variances, 40 CFR 403.13(1983) is set forth in the Appendix at A-9-11.

STATEMENT OF THE CASE

The Clean Water Act directs EPA to promulgate technology-based wastewater treatment requirements for various industrial categories, including the metal finishing category. As with other categories, EPA based its regulation of metal finishers on more typical plants and deferred consideration of any atypical plants to later "variance" proceedings. Approximately six months after the regulations were published, and before facilities could obtain review of their individual situations, EPA withdrew the variance mechanism for so-called "toxic" pollutants, which pollutants are covered by the metal finishing regulations. (49 Fed. Reg. 5131 (2/10/84)). To date, the provision remains unavailable. Because the metal finishing compliance deadline is February 15, 1986, a variance from the metal finishing regulations is not available.

This petition seeks review of a judgment of the Third Circuit Court of Appeals which upheld EPA's metal finishing regulations, including the present compliance deadline. Petitioner seeks certiorari because the decision below suggests that compliance with certain categorical regulations may be required even though atypical facilities never had an opportunity to apply for a variance. Such a decision is contrary to this Court's opinion in *E.I. duPont de Nemours & Co.* v. *Train,* 430 U.S. 112 (1977) ("duPont").

A.

Legislative And Administrative Background

The Clean Water Act established technology-based treatment requirements for all industrial dischargers to waters of the United States. These requirements are applicable to industrial facilities that discharge water directly to the waters of the United States ("direct dischargers") and industrial facilities the discharge to municipal sewer systems ("indirect dischargers").

Existing direct dischargers first had to meet effluent limitations based on Best Practicable Control Technology currently available ("BPT") and later, Best Available Technology economically achievable ("BAT"). 33 U.S.C. §§ 1311(b)(1)(A), (b)(2)(A) and (C), 1314(b)(1) and (2). Existing indirect dischargers have to meet pretreatment standards ("PSES"). 3 U.S.C. § 1317(b).

The standards for both direct and indirect dischargers are developed together and set at equivalent levels.[1] Congress has clearly delineated the factors EPA is required to consider in establishing technology-based standards for all dischargers.[2]

Among the factors to be considered are the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact and other factors that the Administrator deems appropriate. 33 U.S.C. § 1314(b)(1)(B) (1982).

EPA has implemented the Congressional provisions of the Act through a rulemaking program to establish technology-based regulations for twenty-one major industries and sixty-five so-called "toxic" pollutants. To establish regulations EPA collects data on dischargers in a particular industrial category.

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[1] Pursuant to a settlement agreement between EPA and four environmental groups, EPA must set PSES at a level equivalent to BPT- and BAT-level limitations. *NRDC* v. *Train*, 8 E.R.C. 2120 (D.D.C. 1976), *modified sub nom. NRDC* v. *Costle*, 12 E.R.C. 1833 (D.D.C. 1979), *modified sub nom. NRDC* v. *Gorsuch*, 12 E.L.R. 20570 (D.D.C. 1982), *modified sub nom. NRDC* v. *Ruckelshaus*, 14 E.L.R. 20185 (D.D.C. 1984). Congress incorporated the consent decree by reference and thereby endorsed this approach to setting PSES in the 1977 amendments.

[2] 33 U.S.C. § 1314(b) (1976 & Supp. V 1981). Section 304 explicitly applies only to the establishment of BPT- and BAT-level limitations. However, the Agency also considers the Section 304 factors when establishing pretreatment standards based on the consent decree discussed in footnote 1 above.

However, EPA itself has recognized that it may overlook relevant factors applicable to an individual facility. To account for possible atypical facilities not considered during rulemaking, EPA made provision for variances from categorical regulations. EPA has relied on the variance procedure in promulgating virtually every BPT, BAT and pretreatment regulation, including the one for the metal finishing industry. 48 Fed. Reg. § 2462, § 2474(7-15-83). The Fundamentally Different Factors ("FDF") variance clause for direct dischargers is codified in EPA's NPDES permit regulations at 40 CFR § 125.31 (1983). For indirect dischargers, the FDF variance clause is included in EPA's general pretreatment regulations at 40 CFR § 403.13 (1983).

B.

The Proceedings Below

On July 15, 1983, EPA published regulations applicable to direct and indirect dischargers in the metal finishing industry. (48 *Fed. Reg.* 32462-32488 (7/15/83)). The metal finishing category comprises plants which perform six electroplating operations and, if a plant performs one of the six, discharges from forty-six other operations are also regulated. The pretreatment standards cover about 7,500 metal finishers which must comply with the regulations by February 15, 1986. Modine has a number of facilities which are ostensibly subject to the metal finishing pretreatment standards. It considers these facilities to be fundamentally different from the typical plants used by the Agency to establish the metal finishing pretreatment standards. In promulgating the metal finishing regulations, EPA relied on the FDF variance provision in 40 CFR § 403.13 to consider any plants which were fundamentally different from those considered in framing the pretreatment standards. However, fundamentally different facilities have never had an opportunity to apply for a variance. (48 *Fed. Reg.* at 32474).

Soon after the metal finishing regulations were published, the Third Circuit Court of Appeals decided *National Association Of Metal Finishers* v. *EPA*, 719 F.2d 624 (3rd Cir. 1983). In that case, the Third Circuit held that no variances could be applied to pretreatment standards concerning so-called toxic materials. On February 10, 1984, the EPA so modified the FDF variance provision. That, of course, removed the mechanism EPA had relied on during rulemaking to recognize any individual factors within metal finishing facilities. Thereafter, this Court held, in *Chemical Manufacturers Assoc.* v. *Natural Resources Defense Council,* 105 S.Ct. 1102 (1985) ("CMA"), case, that EPA may grant variances to fundamentally different facilities and the Agency has said that it will reinstate the variance provision. However, as the record now exists, no individual indirect discharger was ever considered by the Agency and no fundamentally different factors can be considered until EPA does reinstate the variance. In the meantime, the February, 1986 metal finishing compliance deadline fast approaches.

Modine filed a timely petition for review of the metal finishing pretreatment standards asking the court of appeals to either require EPA to reopen the metal finishing record to consider atypical plants or to extend the compliance deadline to allow Modine a meaningful opportunity to seek a variance when the procedure is reinstated. The Third Circuit denied Modine's petition for review. If allowed to stand, the Third Circuit's decision removes the very flexibility from the metal finishing regulations which this Court found so essential to EPA's rulemaking program in *duPont.*

II.

REASONS FOR GRANTING CERTIORARI

The Court should grant this petition for certiorari for the following reasons: (1) the decision below is contrary to a prior decision of this Court, and (2) the decision below raises an important issue requiring this Court's attention.

A.

The Decision Below Is Contrary to A Prior Decision Of This Court.

The decision below is contrary to this Court's decision in *E.I. duPont de Nemours & Co. v. Train,* 430 U.S. 112(1977) ("duPont"). In *DuPont,* this Court held that EPA was authorized to set BPT limits by regulation "so long as some allowance is made for variations in individual plants . . ." 430 U.S. at 128. In that case, EPA had included a variance clause in its 1977 BPT limitations. This Court has since interpreted the *duPont* ruling as not only authorizing but requiring variance provisions in regulations which are applicable to classes or categories of point sources. *Environmental Protection Agency* v. *National Crushed Stone Association,* 449 U.S. 64 (1980).

Recently, this Court has aga n upheld EPA's authority to issue variances from categorical regulations. When this Court reversed a Third Circuit decision prohibiting FDF variances, it reaffirmed the importance of the variances to EPA's rulemaking scheme. This Court said that Congress may well have chosen to allow FDF variances in order to insure that the pretreatment standards enacted under the Clean Water Act were not overturned. Moreover, this Court stated that it had previously upheid regulations, in part, because variance provisions were included to ensure due process. This Court also noted that the courts of appeals had found the FDF procedure critical to the validity of pretreatment requirements. *Chemical Manufacturers Association* v. *Natural Resources Defense Council, Inc.,* 105 S.Ct. 1102, 1112 (1985).

Contrary to this Court's holdings in the *duPont, National Crushed Stone* and *CMA,* the Third Circuit has upheld the metal finishing regulations which presently provide no mechanism for obtaining a variance and will require compliance before any variance can reasonably, if ever, be sought. To explain, it was only a few months after the metal finishing

regulations were promulgated that the Third Circuit erroneously invalidated the Agency's FDF variance clause, *National Association of Metal Finishers* v. *Environmental Protection Agency,* 719 F.2d 624 (3rd Cir. 1983) *rev'd sub nom. Chemical Manufacturers Association* v. *Natural Resources Defense Council, Inc.,* 105 S.Ct. 1102 (1985) ("NAMF"), and EPA amended its regulations to comply with the Third Circuit's decision. Since variance requests were not due until after the variance provision was withdrawn, atypical plants had no opportunity to apply. They still have no opportunity to apply. Furthermore, although the Agency has represented that it will reinstate FDF variances, it has yet to give notice of any intended rulemaking on this issue. In the meantime, only six months remain until Modine must comply with the metal finishing regulations on February 15, 1986. Even in the face of this "Catch 22" situation, the Third Circuit upheld the regulations and the deadline for compliance with them.

We therefore submit that the decision below is contrary to this Court's decision in *duPont.*

B.

The Decision Below Presents An Important Question Which Should Be Settled By This Court.

For companies subject to the metal finishing regulations, the due date for variance applications came after the variance provision was withdrawn on February 10, 1984 yet the compliance deadline is just six months away, not enough time to obtain a decision from the Agency even if the provision is reinstated. The same is true of any other pretreatment regulation promulgated before the NAMF decision with a compliance deadline after the decision.

There simply is no opportunity to seek, much less obtain, a variance.

Raising this issue to the Third Circuit, Modine requested that the Court resolve the problem by requiring that EPA extend the compliance deadline to allow Modine a reasonable opportunity to seek a variance before it was required to comply with the general pretreatment standards. The Court refused. The decision by the Third Circuit essentially renders this Court's decisions in *CMA* and *duPont* meaningless. If a facility is not given the time to apply for a variance, the fact that EPA has authority to issue variances provides none of the safeguards which the variance was intended to provide.

Furthermore, the Third Circuit's decision completely ignores the long established underpinnings of EPA's regulatory program. EPA is required, when establishing every categorical regulation, to account for relevant differences among facilities. 33 U.S.C. § 1314. EPA has been permitted by this court, as well as various courts of appeals, to address only typical plants in the national regulations because it provided a means of accounting for differences among plants in a post-promulgation variance proceeding. *CMA* v. *NRDC,* 105 S.Ct. 1102 (1985); *E.I. duPont de Nemours & Co.* v. *Train,* 430 U.S. 112 (1976); *Kennecott Copper Corp.* v. *EPA,* 612 F.2d 1232 (10th Cir. 1979); *Weyerhauser Co.* v. *Costle,* 590 F.2d 1011 (1978). However, if, as here, a facility is not given the time necessary to seek the Agency's consideration of its situation, EPA has not fulfilled its statutory obligation. Under these circumstances, the Third Circuit's refusal to require that the Agency extend the metal finishing compliance deadline undermines the very principle upon which categorical regulations were founded and upon which they have been upheld by the courts.

For this reason, Petitioner requests that this Court grant its petition for certiorari.

CONCLUSION

Modine's petition for certiorari should be granted.

Respectfully Submitted,

MODINE MANUFACTURING CO.

By_____

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